(2)

Supreme Court, U.S.
FILED
OCT 31 1996
CLERK

No. 96-549

In The

Supreme Court of the United States

October Term, 1996

EMMA TOVAR

Petitioner,

vs.

IBP, inc.,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

BRIEF IN OPPOSITION

*JOHN JURCYK, JR.
DOUGLAS M. GREENWALD
McANANY, VAN CLEAVE
& PHILLIPS, P.A.
707 Minnesota Avenue, Suite 400
P.O. Box 171300
Kansas City, Kansas 66117
(913) 371-3838

Counsel for Respondent

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

29 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether any federal constitutional rights are implicated by the Kansas Supreme Court's imposition of a clear and convincing evidence standard of proof in a common law cause of action for discharge in retaliation for exercise of rights under a state Workers' Compensation Act.

2. Whether consideration of the clear and convincing evidence standard in ruling a motion for summary judgment on a state common law cause of action is appropriate under Federal Rule of Civil Procedure 56 as construed in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247, 106 S.Ct. 2505, 2509-2510, 91 L.Ed.2d 202 (1986).

RULE 29.1 STATEMENT

Pursuant to Rule 29.1 of the Rules of this Court, respondent IBP, inc. states that the only interested persons in this proceeding are those persons listed as parties to this proceeding and their attorneys.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i
RULE 29.1 STATEMENT ii
TABLE OF AUTHORITIES iv
STATEMENT OF THE CASE 1
REASONS FOR DENYING WRIT OF CERTIORARI ... 13
I. SUMMARY OF ARGUMENT 13
II. ARGUMENT 14
CONCLUSION 23

TABLE OF AUTHORITIES

Page

CASES:

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247, 106 S.Ct. 2505 91 L.Ed.2d 202 (1986) ... 14, 15, 17, 22

Barbara Oil Co. v. Kansas Gas Supply Corp., 250 Kan. 438 827 P.2d 24 (1992) ... 18

Brown v. United Methodist Homes for the Aged, 249 Kan. 124 815 P.2d 72 (1991) ... 17

Chandler v. Central Oil Corp., 253 Kan. 50, Syl. no. 5, 853 P.2d 649 (1993) ... 18

John Hancock Mutual Life Insurance Co. v. Weisman, 27 F.3d 500 (10th Cir. 1994) ... 16

Malek v. Martin Marietta Corp., 859 F.Supp. 458 (D.Kan. 1994) ... 16

Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574 106 S.Ct. 1348 89 L.Ed.2d 538 (1986) ... 22

Nordstrom v. Miller, 227 Kan. 59 605 P.2d 545 (1980) ... 18

Ortega v. IBP, inc., 1993 WL 463526 (D.Kan., September 27, 1993) ... 15

Ortega v. IBP, inc., 255 Kan. 513, 874 P.2d 1188 (1994) ... *passim*

Ortega v. IBP, inc., 1994 WL 373887 (D.Kan. July 1, 1994)) ... 2

Pilcher v. Board of County Commissioners, 14 Kan.App.2d 206 787 P.2d 1204 (1990) ... 18

Richardson v. Matthews, 882 F.Supp. 6 (D.Mass. 1995) ... 16

TABLE OF AUTHORITIES – Continued

Page

Rosas v. IBP, inc., 869 F.Supp. 912 (D.Kan. 1994) 16, 17, 18

Roskob v. IBP, inc., 810 F.Supp. 1229, (D.Kan. 1993), *aff'd*, 21 F.3d 1121 (10th Cir. 1994)(Table)..... 16

STATUTES:

K.S.A. 44-510g..... 4

BRIEF IN OPPOSITION

The Respondent, IBP, inc., respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Order and Judgment of the United States Court of Appeals for the Tenth Circuit.

STATEMENT OF THE CASE

This civil action was one for retaliatory discharge and intentional infliction of emotional distress brought under Kansas state law in which plaintiff employee alleged that she was discharged from her employment with defendant/respondent on August 19, 1991 in retaliation for having two years earlier filed a workers' compensation claim. Subject matter jurisdiction in the United States District Court for the District of Kansas was premised solely on diversity of citizenship.

After the close of discovery, defendant filed its motion for summary judgment on July 12, 1993. The motion was fully briefed by both parties by the end of August 1993. On September 27, 1993, the district court certified to the Kansas Supreme Court an issue of Kansas substantive law – whether an employee-at-will making a claim for termination in retaliation for exercise of statutory rights under the Kansas Workers' Compensation Act must prove her claim by clear and convincing evidence. The Kansas Supreme Court on May 27, 1994 in *Ortega v. IBP, inc.*, 255 Kan. 513, 874 P.2d 1188, answered affirmatively, holding that under Kansas law, a plaintiff is required to prove a claim for retaliatory discharge by a

preponderance of the evidence that is "clear and convincing in nature."

The district court then granted defendant's motion for summary judgment by Memorandum and Order dated July 1, 1994. (That decision is reported at 1994 WL 373887 (D.Kan. July 1, 1994)). Judgment was entered in favor of defendant on plaintiff's state law claims on September 27, 1994. Plaintiff appealed the entry of summary judgment to the United States Court of Appeals for the Tenth Circuit, which affirmed in an unpublished Order and Judgment dated May 29, 1996. The appellate court cited to the burden of proof in a retaliation case established by the Kansas Supreme Court in *Ortega v. IBP, inc.*, 255 Kan. at 528 – preponderance of the evidence, but the evidence must be clear and convincing in nature. It then concluded that "while the outer perimeter of this standard may be elusive, the district court was easily within it in this case." The Tenth Circuit affirmed "substantially for the reasons set out" in the district court's June 30, 1994 Memorandum and Order.

In her Statement of The Case, plaintiff/petitioner sets out very few of the relevant facts that were before the district court in the briefing on the defendant/respondent's motion for summary judgment. The pertinent facts were as follows.

Plaintiff was employed at defendant's Emporia, Kansas plant from May 15, 1975 until her termination on August 19, 1991. (Aplee.Supp.App. at 2). Following a work-related injury to her back which occurred on April 14, 1989, plaintiff filed a Kansas workers' compensation

claim on or about August 15, 1989. (Aplee.Supp.App. at 4).

During 1989 and 1990, plaintiff was treated by Dr. David Tillema and Dr. John Wertzberger, orthopedic surgeons. Both physicians imposed light duty work restrictions on plaintiff, including no frequent bending or stooping, no lifting over 15 pounds, and no pushing or pulling. (Aplee.Supp.App. at 10). On April 10, 1990, the Administrative Law Judge ordered plaintiff referred for vocational rehabilitation assessment for the purpose of an evaluation and for a report on the need for vocational rehabilitation services. (Aplee.Supp.App. at 17-18). On April 17, 1990, plaintiff's vocational rehabilitation case was referred by defendant to Kansas Rehabilitation and Clinical Consultants ("KRCC"). (Aplee.Supp.App. at 20). On May 29, 1990, Ms. Ebberts of KRCC completed plaintiff's vocational assessment/evaluation. This evaluation noted that plaintiff's "[c]urrent restrictions limit her physical activity to a light duty position . . . " (Aplee.Supp.App. at 24).

On July 10, 1990, plaintiff saw Dr. Tillema for evaluation. Dr. Tillema concluded that each of three light duty positions at defendant's plant were "quite appropriate for this patient." Dr. Tillema completed a Work Capacities Form indicating that plaintiff had reached maximum medical improvement and releasing her to return to work at defendant part-time for two weeks and then full time. Ms. Ebberts, who had undertaken the management of plaintiff's return to work, met with plaintiff at defendant's Emporia plant on July 18, 1990 to observe the picking position. In her Rehabilitation Vendor Progress Report dated July 27, 1990, Ms. Ebberts noted that "[i]t is

anticipated that Ms. Tovar will be able to return to her same employer/another job." (Aplee.Supp.App. at 30-34).

On September 25, 1990, Ms. Ebberts completed plaintiff's Vocational Rehabilitation Plan pursuant to K.S.A. 44-510g. The plan priority selected was for plaintiff to return to work at defendant with accommodation. Ms. Ebberts stated that "the employer has offered a position to plaintiff which fits within her physical capabilities . . . " The report further noted that in spite of plaintiff's numerous absences from work, defendant "continues to work with Mrs. Tovar in an effort to assist her in returning to full time employment." The report continued further:

> It should be noted that Dr. Tillema, as well as doctor Wertzberger have released Ms. Tovar to work part time (4 hours per day, 5 days per week). In order to maintain her employment with IBP it is important for Ms. Tovar *to attempt to work four hours per day*. Should she choose not to attempt to work fours hours per day, the alternatives are: request a leave of absence, quit or be fired. (Emphasis added).

The September 25, 1990 rehabilitation plan identified plaintiff's responsibilities as follows:

> 1. Maintain regular contact with counselor by phone.
>
> 2. Alert counselor of any changes in her physical condition.
>
> 3. Participate fully in vocational rehabilitation plan.

The vocational rehabilitation plan was approved by the Assistant Rehabilitation Administrator on October 8, 1990. (Aplee.Supp.App. at 40-42).

From September 28, 1990 through May 31, 1991, Dr. Wertzberger provided plaintiff with several off work slips. (Aplee.Supp.App. at 44, 49-50, 52-53, 55-56, 58-59, 61-62). On May 11, 1991, Dr. Wertzberger visited the defendant's Emporia plant to generally observe and familiarize himself with the types of jobs available at the plant. (Aplee.Supp.App. at 79). At that time, he was able to observe an accommodated picking fat position defendant planned to make available to plaintiff. (*Id.*)

On May 24, 1991, Ms. Ebberts wrote to Dr. Wertzberger providing him with a job analysis for the picking trim from belt position that defendant had made available to plaintiff. She informed Dr. Wertzberger that the job involved:

> "remove trim from the bone belt and put into the trim belt (trim belt located directly next to bone belt). The weight of the lean trim is arranged from 2 ounces to the maximum of 1 pound. This position can be done with one hand, it can be done sitting down and requires no heavy lifting. This position also can accommodate frequent breaks. The position requires minimal to no twisting or bending. Iowa Beef Processors' has made this position available for Mrs. Tovar at this time."

Ms. Ebberts asked Dr. Wertzberger to fill out a Work Capacities Form and "evaluate the position for appropriateness in regards to Ms. Tovar's physical condition and ability to return to work." Ms. Ebberts copied this

letter to plaintiff's attorney, David Alegria, and to plaintiff, as she did with all her correspondence. (Aplee.Supp.App. at 85-86). Plaintiff testified that when she received letters from Ms. Ebberts, her son read them to her. (Aplee.Supp.App. at 89).

On May 31, 1991, Dr. Wertzberger replied to Ms. Ebberts enclosing the completed Work Capacities Form. The letter stated as follows:

> "I received your information related to IBP's attempt to accommodate Mrs. Tovar's low back problems and complaints. I have reviewed the photograph which accompanied your Work Capacities Form and reviewed Dr. Tillema's evaluation. Essentially, Dr. Tillema and I agree on her functional capacity capabilities, and I would advise progressing into a full-time work activity over approximately two months. I have personally observed this particular job and agree that it is highly sedentary, requiring the ability to intermittently change positions, turn around or move in the work space, while continuing to comply with the job requirements.
>
> Based on my observations of this task, I would conclude that Mrs. Tovar will be capable of working into a full-time work activity over the next two months."

(Aplee.Supp.App. at 122). The enclosed Work Capacities Form indicated that in Dr. Wertzberger's medical opinion, plaintiff would reach a stable medical condition as of July 1, 1991 and that she was released to return to work to attempt the accommodated position at defendant four hours a day working into full time activity over a two-month period. (Aplee.Supp.App. at 123).

On June 13, 1991, Ms. Ebberts provided Mr. Gary Korte of defendant with the May 31, 1991 letter of Dr. Wertzberger and the Work Capacities Form. Ms. Ebberts advised that Dr. Wertzberger had released plaintiff to return to work on a part-time basis and that Ebberts had verified this through Dr. Wertzberger's office. Ms. Ebberts further indicated that defendant's Emporia plant would make the accommodated position available to plaintiff and that she had informed plaintiff's counsel that plaintiff was to report to work on June 17, 1991. This letter was copied to plaintiff. (Aplee.Supp.App. at 125-126).

On June 19, 1991, plaintiff's counsel wrote to Mr. Korte and advised that plaintiff "will return to work on July 1, 1991." (Aplee.Supp.App. at 128). Plaintiff's counsel enclosed a June 17, 1991 letter of Dr. Wertzberger. That letter indicated that since plaintiff had been out of the country at the time that Dr. Wertzberger had released her to work activities, Dr. Wertzberger concluded that July 1, 1991 was "a reasonable time for expecting Ms. Tovar to return to her work activities as modified by her employer." (Aplee.Supp.App. at 129). Ms. Ebberts also indicated in her June 25, 1991 Vocational Plan Progress Report that she had received Dr. Wertzberger's letter indicating that July 1, 1991 was a reasonable date for plaintiff to return to work. (Aplee.Supp.App. at 131).

Plaintiff returned from Mexico on June 23, 1991. (Aplee.Supp.App. at 134, 136). She received Ms. Ebberts' letter and the letter from her lawyer to Mr. Korte dated June 19, 1991 to which was attached Dr. Wertzberger's letter of June 17, 1991 and she was aware that both letters stated that she was to report to work for a light duty job

on July 1, 1991. (Aplee.Supp.App. at 91-92). Plaintiff understood from talking to Ms. Ebberts that the job she was going back to had been modified so she could perform it as light duty. (Aplee.Supp.App. at 105). Plaintiff understood and knew from talking to Ms. Ebberts that Dr. Wertzberger had gone out to the defendant's plant and looked at the job defendant had modified and that Dr. Wertzberger felt she could perform the job. (*Id.*)

Plaintiff did not return to work at defendant's plant to attempt the accommodated position on July 1, 1991 or at any time prior to August 26, 1991. (Aplee.Supp.App. at 91-92, 105). Plaintiff was in Emporia the entire month of July 1991 until August 10, 1991. (Aplee.Supp.App. at 96). Plaintiff did not contact anyone at defendant with respect to her return to work on July 1, 1991. Plaintiff was unable to recall any specific date or time when she contacted anyone at the plant between July 1, 1991 and August 26, 1991. (Aplee.Supp.App. at 101-105).

Although at one point during her deposition, plaintiff claimed to have contacted Nancy Downs, defendant's Workers' Compensation Coordinator, regarding her failure to return to work, she contradicted herself numerous times with respect to this alleged communication, as well as regarding alleged communications with Ms. Ebberts, her doctor and her attorney during the summer of 1991. First, plaintiff testified she did not talk to Nancy Downs from June 19, 1991 through August 26, 1991. (App.Supp.App. at 98-99). Then, after a break, she testified that she "was in contact with IBP". (Aplee.Supp.App. at 100). She conversely stated she does not remember what day she contacted Nancy Downs and she does not remember if it was before July 1, 1991. (Aplee.Supp.App.

at 93-94). Plaintiff does not remember whether she called anyone at defendant before July 1, 1991 to advise them she was not going to return to work. (Aplee.Supp.App. at 94). She does not remember whether she told her attorney before July 1, 1991 that she was not going to return to work. (Aplee.Supp.App. at 93-94, 103). She does not remember whether she told Dr. Wertzberger that she was not going to return to work for defendant before July 1, 1991. (Aplee.Supp.App. at 95). She does not remember talking to anyone on the phone or sending any letter to anyone at defendant during July 1991. (*Id.*) She does not remember talking to her attorney or to anyone in his office between June 19, 1991 and July 1, 1991. (Aplee.Supp.App. at 100). It is possible that she talked to Nancy Downs between June 19 and August 26, 1991, but she really does not know. (Aplee.Supp.App. at 103). She has no recollection or remembrance of what she possibly might have said to Nancy Downs. (Aplee.Supp.App. at 116). After she received her attorney's letter of June 19, 1991, she might have gone over and possibly talked to Nancy Downs but she is not positive about it one way or the other. (*Id.*)

In contrast, Nancy Downs unequivocally testified that she was not contacted by plaintiff during the summer of 1991 until after Downs' birthday on August 17, 1991. (Aplee.Supp.App. at 143, 144, 146, 150-157). If she had been contacted by plaintiff earlier, she would remember it. (Aplee.Supp.App. at 145). The last time she remembered talking to plaintiff was in 1989. (Aplee.Supp.App. at 147). She never talked to plaintiff on the phone. (*Id.*)

In her deposition, plaintiff contradicted herself with respect to her reasons for not returning to work at defendant after her doctors had released her to return. She testified that she did not return to work on July 1, 1991 because her back was hurting. (Aplee.Supp.App. at 108). A few minutes later, she testified she physically could have performed the picking fat light duty job in July 1991, but asserted that she did not return to work because in 1989 or 1990 "Greg Stromgren told me not to come back to IBP until I was okay to go to my regular job." (Aplee.Supp.App. at 112).

On July 10, 1991, plaintiff returned to Dr. Wertzberger's office. She requested a letter stating she could not work. Dr. Wertzberger declined to provide her with such a letter. After noting plaintiff's complaint that she did not want to work in pain, he wrote that plaintiff required an accommodation for her spinal stenosis, but that she was capable of performing the picking fat job based upon his personal observation. (Aplee.Supp.App. at 159). Plaintiff testified that when she went to Dr. Wertzberger's office on July 10, 1991 she believed she was physically able to perform the light duty job. (Aplee.Supp.App. at 112).

Based on Dr. Wertzberger's May 31, 1991 letter, Rodger Brownrigg, defendant's Personnel Director at the Emporia plant, believed that plaintiff could return to work on May 31, 1991. (Aplee.Supp.App. at 167). Subsequently, he received the letter from Dr. Wertzberger stating that July 1, 1991 was the appropriate return to work date. (Aplee.Supp.App. at 168). Once a treating physician releases an employee to return to work, defendant requires that employee to return to work. (Aplee.Supp.App. at 164).

It is defendant's policy that regardless of the reason, an employee must advise defendant when she is not going to be at work and the reason why. An employee cannot come and go as she pleases to work. (Aplee.Supp.App. at 139-142, 165).

Towards the end of July 1991, Mr. Brownrigg became aware that plaintiff had not returned to work at defendant despite having been released by her doctor to do so. (Aplee.Supp.App. at 168). According to defendant's attendance policies, plaintiff could have been terminated after three no call/no show absences. (Aplee.Supp.App. at 171-173). Mr. Brownrigg informed Mr. Korte that plaintiff would be terminated for job abandonment for failing to appear at the plant or to contact anyone at the plant regarding her return to work. Mr. Korte suggested a two-week notice letter. (Aplee.Supp.App. at 178-179). Subsequently, Mr. Korte drafted a letter to plaintiff's counsel dated August 2, 1991 which gave plaintiff two weeks notice to return to work or to be terminated. Mr. Korte indicated that as of August 2, 1991, the plant was "totally and completely unaware of Ms. Tovar's whereabouts. There has been no contact from your office or from Ms. Tovar to advise when or if she intends to return to work at IBP, inc. to the light duty position." (Aplee.Supp.App. at 183).

Plaintiff was aware of Mr. Korte's August 2, 1991 letter, but she failed to return to work within the two week deadline. (Aplee.Supp.App. at 109). She was in the United States at least until August 10, 1991, but then left for Mexico to visit her sick mother. (Aplee.Supp.App. at 109, 115, 134, 136).

On August 16, 1991, the final date of the two-week notice period, plaintiff's counsel contacted Mr. Korte and stated he was having difficulty contacting plaintiff. Plaintiff's counsel requested additional time to get plaintiff back to work. Mr. Korte agreed to give plaintiff until August 19, 1991. (Aplee.Supp.App. at 179-181).

Plaintiff failed to appear at defendant's Emporia plant on or before August 19, 1991 and she was terminated by Mr. Brownrigg on that date for job abandonment. The termination paperwork was completed on September 5, 1991. (Aplee.Supp.App. at 2, 192). Plaintiff came to the plant on August 26, 1991 and was told to contact her attorney who informed her of her termination. (Aplee.Supp.App. at 148).

Mr. Brownrigg terminated plaintiff because she failed to appear for work on July 1, 1991 and failed to contact her employer. Defendant gave her an additional two weeks to get back to work and she still failed to appear. (Aplee.Supp.App. at 169-170). Based upon an almost two and one-half month period during which plaintiff did not show up for work after she had been released by her physician to return to light duty work, Mr. Brownrigg testified defendant gave her "more breaks than we probably would have given anybody else." (Aplee.Supp.App. at 175).

Plaintiff concedes that when Dr. Wertzberger gave her an *off work slip* she followed his instructions but when he told her to go *back to work* to her light duty position, she did not follow his directions. (Aplee.Supp.App. at 113).

Plaintiff further concedes she did not tell anyone at defendant that she was going to Mexico in March, June or August of 1991. (Aplee.Supp.App. at 117).

Based upon her prior job experience with defendant, plaintiff was aware that, as an employee of defendant, if she desired to take time off she could not just do it on her own and show up for work when she chose. (Aplee.Supp.App. at 118). Plaintiff understood that she could be terminated for missing too much work. (Aplee.Supp.App. at 119).

Defendant has no financial incentive to terminate employees who suffer on-the-job injuries. In fact, the opposite is the case. There is no financial incentive to defendant to terminate an employee who has been injured on the job and who has filed a workers' compensation claim. If an injured worker is terminated, the indemnity reserve is raised by 50% because experience indicates claims for injured workers no longer employed are more expensive. (Aplee.Supp.App. at 222).

REASONS FOR DENYING WRIT OF CERTIORARI

I. SUMMARY OF ARGUMENT

This state common law cause of action for retaliatory discharge presented a fact-specific inquiry into the basis for the discharge of plaintiff for failure to return to work pursuant to the directions of her treating physicians. It does not raise any important issues of federal law. The substantive law applicable to the defendant's motion for summary judgment was Kansas law and, specifically, the

Kansas Supreme Court's holding in *Ortega v. IBP, inc.*, 255 Kan. 513, 874 P.2d 1188 (1994), that a plaintiff bears the burden in a retaliatory discharge case of establishing her cause of action by a preponderance of the evidence that is clear and convincing in nature. The district court correctly considered this higher evidentiary standard in ruling the motion for summary judgment. In particular, there was not evidence in the discovery record that reasonable jurors could have found, by a preponderance of the evidence that was clear and convincing in nature, established a causal connection between plaintiff's exercise of rights under the Kansas Workers' Compensation Act and defendant's discharge of plaintiff for job abandonment. The district court's entry of summary judgment in favor of defendant employer, affirmed by the United States Court of Appeals for the Tenth Circuit, did not deprive plaintiff of any constitutional right to jury trial, but rather complied fully with the requirements of Federal Rule of Civil Procedure 56, as construed in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247, 106 S.Ct. 2505, 2509-2510, 91 L.Ed.2d 202 (1986).

II. ARGUMENT

Plaintiff's principal grounds for seeking a writ of certiorari is the allegation that the district court and the Tenth Circuit Court of Appeals incorrectly imposed a clear and convincing burden of proof on plaintiff at the summary judgment stage of the litigation. However, because the inquiry regarding the existence of genuine issues of material fact under Federal Rule of Civil Procedure 56 necessarily implicates the substantive evidentiary standard of proof that would apply at trial, the

district court here properly decided the motion for summary judgment with reference to the clear and convincing burden.

Indeed, the district court acted with much care regarding the proper standard of proof. After the close of discovery and after the parties had fully briefed defendant's motion for summary judgment, the district court certified a question of state law to the Kansas Supreme Court – whether an employee-at-will claiming a termination in retaliation for exercise of statutory rights under the Kansas Workers' Compensation Act must prove that claim by clear and convincing evidence. *See Ortega v. IBP, inc.*, 1993 WL 463526 (D.Kan., September 27, 1993). The Kansas Supreme Court answered the certified question affirmatively. "A party having the burden of proving a discharge from employment in retaliation for having filed a workers compensation claim must establish that claim by a preponderance of the evidence, but the evidence must be clear and convincing in nature. It is clear if it is certain, unambiguous, and plain to the understanding. It is convincing if it is reasonable and persuasive enough to cause the trier of facts to believe it." *Ortega v. IBP, inc.*, 255 Kan. 513, 528, 874 P.2d 1188 (1994).

In deciding defendant's motion for summary judgment, the district court correctly referred to and applied the more rigorous clear and convincing evidentiary standard of proof. Federal Rule of Civil Procedure 56 mandates that evidence presented in support of and in opposition to a motion for summary judgment must be reviewed under the substantive law and evidentiary burden applicable to each claim. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247, 106 S.Ct. 2505, 2509-2510, 91

L.Ed.2d 202 (1986); *Roskob v. IBP, inc.*, 810 F.Supp. 1229, 1230 (D.Kan. 1993), *aff'd*, 21 F.3d 1121 (10th Cir. 1994) (Table). Because on May 27, 1994 the Kansas Supreme Court established that the applicable evidentiary burden for a claim of retaliatory discharge under Kansas law is preponderance of the evidence that is clear and convincing and nature, this means that in opposing summary judgment on a state law retaliation claim, the plaintiff had the burden of producing evidence, which a reasonable jury could find to be clear and convincing, that the plaintiff was discharged in retaliation for pursuing workers' compensation benefits. *Malek v. Martin Marietta Corp.*, 859 F.Supp. 458, 465 (D.Kan. 1994). *Accord, Rosas v. IBP, inc.*, 869 F.Supp. 912, 915-917 (D.Kan. 1994).

Plaintiff confuses the question of what law governs in deciding a motion for summary judgment. The district court and court of appeals review evidence presented in a motion for summary judgment under the substantive law and based on the evidentiary burden that the non-moving party will face at trial on a particular claim. *John Hancock Mutual Life Insurance Co. v. Weisman*, 27 F.3d 500, 503-504 (10th Cir. 1994). However, because federal law controls the procedural aspects of a diversity case, the grant of summary judgment is controlled by the federal summary judgment rule as interpreted by federal courts. *Richardson v. Matthews*, 882 F.Supp. 6, 8 (D.Mass. 1995). What this means in the present case is that the Kansas Supreme Court decision in *Ortega v. IBP, inc.* provided the substantive law and mandated the evidentiary burden under which the district court was to review the evidence presented in support of and in opposition to the defendant's motion for summary judgment. In particular, plaintiff

would have the burden at trial of demonstrating by a preponderance of the evidence that is clear and convincing in nature that defendant discharged her in retaliation for exercise of rights under the Kansas Workers' Compensation Act. Plaintiff's evidentiary burden was to show, by evidence that reasonable persons could find to be clear and convincing, that the discharge was "based on" the exercise of rights under the Kansas Workers' Compensation Act. *Rosas v. IBP, inc.*, 869 F.Supp. at 916; *Brown v. United Methodist Homes for the Aged*, 249 Kan. 124, 147-148, 815 P.2d 72 (1991).

Under Federal Rule of Civil Procedure 56, moreover, that substantive evidentiary standard had to be considered by the district court in evaluating the evidence presented in support of and in opposition to the motion for summary judgment. Summary judgment is appropriate if there is no genuine issue as to any material fact and if the moving party is entitled to a judgment as a matter of law. Federal Rule of Civil Procedure 56(c). The party opposing summary judgment, plaintiff in the present case, must identify sufficient evidence that would require submission of the case to a jury. It is not enough that the nonmovant's evidence be "merely colorable" or anything short of "significantly probative." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-250, 106 S.Ct. 2505, 2510-2511, 91 L.Ed.2d 202 (1986). "Only disputes over facts that might affect the outcome of the suit under the governing law will . . . preclude summary judgment." *Id.*, 477 U.S. at 248. If a movant establishes entitlement to judgment as a matter of law given uncontroverted, operative facts contained in the documentary evidence, summary judgment will lie. *Id.*, 477 U.S. at 251.

In reviewing the evidentiary record, the district court and court of appeals was required to evaluate that evidence under the clear and convincing evidentiary burden that would be applicable at trial to plaintiff's claim of retaliatory discharge. "Clear and convincing" evidence is such that "the witnesses to a fact must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the details in connection with the transaction must be narrated exactly and in order; the testimony must be clear, direct and weighty; and the witnesses must be lacking in confusion as to the facts in issue." *Nordstrom v. Miller*, 227 Kan. 59, 65, 605 P.2d 545 (1980) (Citations and quotations omitted). Clear and convincing evidence is "certain and unambiguous, and plain to the understanding and so reasonable and persuasive as to cause the trier of fact to believe it." *Chandler v. Central Oil Corp.*, 253 Kan. 50, Syl. no. 5, 853 P.2d 649 (1993). Under Kansas law, clear and convincing evidence is not a quantum of proof, but rather a quality of proof. *Ortega*, 255 Kan. at 527, 874 P.2d 1188; *Barbara Oil Co. v. Kansas Gas Supply Corp.*, 250 Kan. 438, 448, 827 P.2d 24 (1992). Plaintiff here does not directly challenge the Tenth Circuit Court of Appeals' conclusion that the district court's evaluation of the evidence relating to plaintiff's discharge and the reasons therefor was "easily within" the preponderance of the evidence that is clear and convincing in nature standard. Plaintiff did not present evidence that reasonable jurors could conclude was clear and convincing of a causal connection between the protected activity or injury, and the termination, which is essential to establish a prima facie case of retaliatory discharge under Kansas law. *Rosas v. IBP, inc.*, 869 F.Supp. at 916; *Pilcher v.*

Board of County Commissioners, 14 Kan.App.2d 206, 213, 787 P.2d 1204 (1990).

The uncontroverted facts presented below were that there was a two-year gap between filing of plaintiff's workers' compensation claim and termination, hardly a chronology that suggests a retaliatory motive on the part of the employer. During 1990 and 1991, plaintiff was off work for large blocks of time and her absences continued long after her treating physicians concluded that plaintiff could return to at least part-time work for defendant. During this same period of time, plaintiff was undergoing vocational rehabilitation and counseling, pursuant to the Kansas Workers' Compensation Act and at her request, which was aimed at returning plaintiff to the workplace. In early 1991, defendant and plaintiff's vocational rehabilitation counselor identified a modified, light duty job at the Emporia plant which was within the physical restrictions imposed on plaintiff by her treating physician, Dr. Wertzberger. This doctor toured that plant on May 11, 1991 and personally viewed the accommodated picking fat position which defendant had made available to plaintiff. On May 31, 1991, Dr. Wertzberger completed a medical evaluation and work capacities form in which he concluded that plaintiff could perform that job position, commencing immediately on a part-time basis and progressing to full-time over a two-month period.

However, because plaintiff at that time was in Mexico for personal reasons, Dr. Wertzberger subsequently determined that July 1, 1991 was "a reasonable time for expecting Ms. Tovar to return to her work activities as modified by her employer." (Aplee.Supp.App. at 129). Plaintiff's vocational rehabilitation counselor concluded the same

thing. (Aplee.Supp.App. at 131). Plaintiff's attorney advised defendant that plaintiff "will return to work on July 1, 1991." (Aplee.Supp.App. at 128). Plaintiff testified that in June 1991 she received Dr. Wertzberger's letter of June 17, 1991 releasing her to return to work on July 1, 1991, the vocational counselor's report of June 25, 1991 also releasing her to return to work on that day, *and* her own attorney's letter which advised defendant that she would be returning to work on July 1, 1991. (Aplee. Supp.App. at 91-92). Despite learning from multiple sources that she was to return to work on July 1, 1991, plaintiff did not so return. She was in Emporia the entire month of July 1991 but did not once come to the plant and attempt to perform the modified, accommodated light duty position. Instead, she attempted to obtain an off-work slip from Dr. Wertzberger on July 10, 1991 which he declined to provide her.

In late July 1991, defendant's personnel director, Mr. Brownrigg, learned that plaintiff had not returned to work even though her treating physician had released her for work activities. Plaintiff's month-long series of absences were unexcused and constituted job abandonment. Nonetheless, defendant chose to give plaintiff another chance to return to work. Plaintiff's counsel was advised by letter dated August 2, 1991 that plaintiff had not appeared for work and had not contacted the plant, and would be discharged if she did not return to work within two weeks. Plaintiff had knowledge of this warning letter but again did not appear for work. She chose to leave for Mexico on August 10, 1991 for family reasons without advising defendant of her travel plans. Plaintiff's counsel on August 16, 1991 requested additional time to

get plaintiff back to work. Although defendant was under no legal obligation to give any more time to plaintiff, it agreed to extend the return to work or termination deadline until August 19, 1991. When plaintiff again did not return to work by this second extended deadline, defendant discharged plaintiff for job abandonment.

There was no evidence presented below suggesting any causal connection between plaintiff's workers' compensation claim and the termination decision made on August 19, 1991. The record is clear that plaintiff had a medical release to return to work effective no later than July 1, 1991 and that she had knowledge of that release. She was given not one or two, but three opportunities to return to work in the light duty position approved by her physician and her vocational counselor but she chose not to return to work and not to attempt (even for a day) that accommodated position. Plaintiff abandoned her job. At the very least, she disregarded the opinions of her physician and vocational counselor and the explicit directions of her employer about returning to work. The district court was correct in its conclusion that "[t]he undisputed facts reveal that Tovar knew that Dr. Wertzberger had released her to begin part-time work, and that IBP expected her to report to work on July 1 and August 16. Tovar failed to report to work on those dates, and she has not shown by clear and convincing evidence that her absence was legitimately due to any work related injury." July 1, 1994 Memorandum and Order, slip op. at 16.

This case does not raise any substantial issues of federal law. Subject matter jurisdiction was premised solely on diversity of citizenship and both the district court and the court of appeals applied solely Kansas

substantive law. That a federal court is to consider the evidentiary burden applicable at trial in ruling a motion for summary judgment has been well-established at least since 1986 with this Court's decision in *Anderson v. Liberty Lobby, Inc.* This includes consideration of the heightened evidentiary standard imposed by the Kansas Supreme Court in *Ortega v. IBP, inc.* for plaintiffs pursuing common law claims of discharge in retaliation for exercise of rights under the Kansas Workers' Compensation Act.

Every time that a summary judgment is entered in favor of a defendant on a particular claim (or in favor of a plaintiff on a particular defense), the losing party is denied a jury trial on that claim or defense, but that hardly implicates the Seventh Amendment right to jury trial. Federal Rule of Civil Procedure 56 creates a procedure for determination of questions of law in advance of trial and one such question is whether the evidence presented by the parties (or developed during discovery) is sufficient, as a matter of law, such that reasonable jurors could find for the non-movant on each essential element of her claim. That inquiry necessarily requires the federal district court to consider the evidentiary standard that will be applicable to the claim at trial. "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial." *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986).

Finally, the underlying facts in this state law action for retaliatory discharge relate to a particular employee, a particular course of medical treatment, a particular

attempt by an employer to accommodate physical restrictions, and a particular failure of the employee to return to work despite directions to do so from her treating physician, her vocational rehabilitation counselor, and her own attorney. The United States Court of Appeals for the Tenth Circuit did not resolve this case in a way that conflicts with applicable decisions of this Court or with decisions of any other United States Court of Appeals. *See* Supreme Court rule 10.1(a) and (3).

CONCLUSION

For the reasons stated herein, certiorari should be denied and the May 29, 1996 Order and Judgment of the United States Court of Appeals for the Tenth Circuit should be affirmed in all respects.

Respectfully submitted,

*John J. Jurcyk, Jr.
Douglas M. Greenwald
McAnany, Van Cleave
& Phillips P.A.
707 Minnesota Avenue,
Fourth Floor
P.O. Box 171300
Kansas City, Kansas 66117
(913) 371-3838
(913) 371-4722 – Facsimile

Counsel for Respondent IBP, inc.

**Counsel of Record*